No. 14,849

IN THE

United States Court of Appeals

For the Ninth Circuit

FLOYD J. OSBORN,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

This Court has jurisdiction of this case under Sections 2243, 2244 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant petitioned for a writ of habeas corpus in the Court below alleging (1) that the prosecution knowingly used perjured testimony, (2) that the pretrial investigating officer did not act in accordance with Article of War 70, Title 10 United States Code Section 1542, (3) that petitioner's counsel was not allowed sufficient time to prepare his defense, (4) that es-

sential witnesses were transferred so they would not be available to petitioner, and (5) that the offense of which he was convicted was not murder. Appellant did not allege that he had exhausted his remedies under Article of War 53.

United States District Judge Louis E. Goodman denied the petition on the ground that the matters complained of had been passed on by a judge of another District Court. Leave to appeal in forma pauperis was denied on the ground that the appeal was not taken in good faith. Appeal was then taken to this Court.

OPINION BELOW.

"Order Denying Petition for Habeas Corpus

"Petitioner, who is confined at Alcatraz Penitentiary pursuant to a judgment and sentence of a general court-martial, seeks a writ of habeas corpus on the following grounds:

(1) that the prosecution knowingly used perjured testimony against him;

(2) that essential witnesses for his defense were wilfully transferred so that they would be unavailable to petitioner.

(3) that the pre-trial Investigating Officer did not conduct the impartial investigation required by the former 70th Article of War;

(4) that counsel for petitioner was denied sufficient time to prepare the defense.

"A previous application to this court for the writ was denied on June 16, 1954, Civil No. 33432. This prior application sought relief on a ground not asserted in the present petition. However, included in the file on the prior proceeding is a certified copy of an order of the United States District Court for the District of Kansas discharging a writ of habeas corpus granted petitioner while he was confined at Leavenworth Penitentiary. It appears from this order that the Kansas court conducted a full hearing respecting the regularity and propriety of petitioner's court martial.

"The Kansas court states in the order that:

'It is petitioner's contention that he was not given a fair and impartial trial, that evidence favorable to him was criminally repressed by the prosecution, and that he was convicted by means of false testimony obtained through coercion and duress from witnesses who formerly had been held as suspects in return for absolution.

'On behalf of respondent the complete record of the court-martial trial was introduced and received in evidence, and from all of the evidence, including the testimony of the petitioner, the court makes the following finding.

. . . . . .

'The court further finds that the charges were properly sworn to, investigated by a military investigating officer and referred for trial before a general court-martial by the Commanding General of the Fifth Army.

. . . . . .

'The court further finds from the evidence that the petitioner was not convicted through the use of false testimony obtained through coercion or duress or by evidence unlawfully obtained or used by prosecuting authorities; on the contrary, the court finds that petitioner was convicted by a general court-martial, legally convened, at a trial in which he was not denied any of his legal or constitutional rights; that the trial was proper and regular in all respects and that the sentence imposed, being within the limits authorized by law for the offense of which the petitioner was found guilty, is valid and binding.'

"Although petitioner asserts in the present petition that the questions raised before the Kansas court were dissimilar to the contentions raised here, he sets forth no facts which would indicate that they were in fact any different, or if so, any reasons why such questions were not or could not have been presented to the Kansas court.

"Dated: January 6, 1955.

"LOUIS E. GOODMAN,

"United States District Judge."

QUESTIONS PRESENTED.

1. Did the petition below present any new ground for decision not theretofore determined by the Kansas court?

2. Has appellant exhausted his administrative remedies?

3. Are any of the so-called "new grounds" urged by appellant sufficient as a matter of law to justify his release?

ARGUMENT.

Appellant argues that three grounds are urged in the present proceeding which were not raised in the Kansas court: (1) that the pre-trial investigating officer acted contrary to law, (2) that counsel had not sufficient time to prepare his defense, and (3) that appellant's crime did not constitute a violation of the 92nd Article of War.

Appellant's allegations with respect to the pre-trial investigation are argumentative, and vague, and utterly fail to disclose any basis upon which it could be determined that an impartial investigation was in fact not made. The United States Supreme Court, however, in the case of *Humphrey v. Smith* (1949), 336 U.S. 695, held that an entire lack of a pre-trial investigation would not affect the jurisdiction of a court martial so as to be grounds for the issuance of a writ of habeas corpus. Furthermore, as appears in Judge Goodman's opinion, the Kansas court specifically found after a full hearing that the court martial charges were properly investigated by a military investigative officer. It was within the Court's discretion to refuse to inquire into the matter further.

Appellant's claim that his counsel did not have adequate time to prepare his defense is even more vague. All appellant has to say concerning this contention is

that counsel for the defense were allowed "but a matter of a few hours to prepare their defense." How this Court, or any court, can be expected to decide whether sufficient time was allowed without an accurate statement of what time was in fact given to defense counsel is hard to determine. No statement is made concerning what motions, if any, were made by defense counsel. The scope of review is more narrow in military cases than in other habeas corpus proceedings. The Supreme Court has held that civil review does not extend to such matters as the competence of defense counsel. *Hiatt v. Brown* (1950), 339 U.S. 103.

Furthermore, it does not appear that appellant ever exhausted his administrative remedies under Article of War 53. He had an opportunity to have his contention passed on by the military courts. From the record it does not appear that he availed himself of that opportunity. In *Gusik v. Schilder* (1950), 340 U.S. 128, the Supreme Court held that unless a showing is made that this remedy is exhausted, there is no jurisdiction for a civil court to inquire into the validity of a military conviction. See also *Hunter v. Beets* (C.A. 10, 1950), 180 F.2d 101; *McMahan v. Hunter* (C.A. 10, 1950), 179 F.2d 661; *Simmons v. Hunter* (C.A. 10, 1950), 179 F.2d 664. This Court has recently come to the same conclusion in the case of *Kethel Osborne v. Swope,* No. 14,697, decided October 27, 1955. The Kansas court, after hearing testimony by appellant, came to the conclusion that appellant was denied none "of his legal or constitutional rights; that the trial was proper and regular in all respects."

This ground, if it be new at all, could not have facilitated appellant's release, and the court below need not have issued a writ of habeas corpus on the basis of it.

Appellant's third claim of a new ground involves the construction of Article of War 92. The factual allegations urged in support of this ground amount to no more than a rehash of the evidence at the trial. The civil courts do not have supervisory or corrective power over the proceedings of a court martial. "The correction of any error it may have committed is for the military authorities which are alone authorized to review its decision." *Hiatt v. Brown,* 339 U.S. 103 (1950), at 111.

The Supreme Court has held in *Burns v. Wilson* (1953), 346 U.S. 137, that the burden was on the petitioners to show that their military review was illegally inadequate to resolve their claims. Here appellant has made no showing that his military review was inadequate or that he in fact even applied for relief through military channels. The court below was, therefore, without jurisdiction to entertain his petition. The judgment below should be affirmed.

Dated, San Francisco, California,
November 7, 1955.

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